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No. 1100

# In the Supreme Court of the United States

OCTOBER TERM, 1969

NORTHERN FREIGHT LINES, INC., ET AL., APPELLANTS

*v.*

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA*

## MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 1a–18a; 304 F. Supp. 536) dismissing an action brought to set aside a report and order of the Interstate Commerce Commission (J.S. 19a–72a; 332 ICC 91). In the decision under review the Commission determined that trucks of the Railway Express Agency, Inc. (REA) engaged in

pickup and delivery services should not be restricted to the terminal areas that apply generally to such services by motor common carriers of freight. See *Commercial Zones and Terminal Areas,* 54 M.C.C. 21.

REA is an express company subject to regulation as such under Section 1(3)(a) of the Interstate Commerce Act (49 U.S.C. 1(3)(a)). In this specialized capacity, REA uses every available mode of carriage, including its own trucks, to perform its inter-community or line-haul transportation (J.S. 28a, 31a, 38a–39a). Before it may operate its trucks in line-haul transportation, REA is required to obtain motor certificates from the Commission (*REA, Determination of Status,* 21 M.C.C. 161, 183, 186–188, 190); however, the certificates issued to REA are unlike the licenses granted to general motor freight carriers, as evidenced by the conditions contained therein recognizing REA's motor operations to be merely an integral part of its whole express service.[1]

In 1964 the Commission on its own motion instituted a rule-making proceeding, and conducted hearings, to consider whether REA, as a consequence of operating its own trucks in its line-haul transportation, should be held to the terminal area limits applicable to

[1] For example, REA's motor certificates contain restrictions limiting its motor authority to that which is auxiliary to or supplemental of its express service, and the shipments which it transports must be limited to those moving on a through bill of lading or express receipts. See, *e.g., Auclair Transportation, Inc.* v. *United States,* 221 F. Supp. 328, 330–331 (D. Mass.), affirmed, 376 U.S. 514).

interstate motor freight carriers.[2] The motor carriers and certain freight forwarders[3] (J.S. 22a, ns. 4–5) urged that REA be treated like nonexpress company motor carriers. But not one shipper participating in the proceeding supported this view. Instead, each one of the many shippers participating, including the Department of Defense and the Department of the Interior (J.S. 21a–22a, n. 3), declared its need for REA's specialized service as an express company, and voiced its concern that such service could be materially impaired if REA were restricted to the terminal area limits of the truckers.

The hearing examiner concluded that REA should be so restricted, but upon review the entire Commission,[4] with three dissents, reversed (J.S. 19a–72a). The Commission reasoned that REA's line-haul operations are not confined to one particular mode of carriage, but that instead, through its use of all available modes, those operations are diverse in character (J.S. 38a). Consequently, the flexibility inherent in REA's service could be improperly impeded if its pickup and delivery services were restricted to the conventional terminal areas when it uses its own trucks in its line-haul opera-

[2] See *REA Extension—Nashua, N.H.*, 91 M.C.C. 311, 322, 338, affirmed on other grounds, *Auclair Transportation, Inc.* v. *United States*, *supra*.

[3] Freight forwarders regulated by the Commission under Part IV of the Interstate Commerce Act (49 U.S.C. 1001–1022) are also subject to the terminal area restrictions applicable to motor freight carriers (see 54 M.C.C. 21, 67–74).

[4] Five Commissioners constituted the majority, with three determining not to participate (J.S. 70a).

tions (J.S. 39a).[5] The Commission further noted that if it imposed upon REA the type of limitation the truckers urged, it would fail in the light of the National Transportation Policy "to recognize and adequately preserve a public service having certain unique and important attributes which clearly distinguish it from other forms of transportation" (J.S. 37a–38a). The Commission observed that this was particularly true when such a substantial segment of the nation's population depended upon that service (J.S. 40a, 43a). Thus, under the Commission's decision, REA remained subject to the special, more liberal terminal area limits that have applied to express companies for 60 years.

The three-judge court below unanimously affirmed (J.S. 1a–18a) the Commission's determination, holding that there was a rational basis for its conclusion that REA offered a distinctive service warranting different terminal area treatment from that received by motor freight carriers (J.S. 17a).[6]

## ARGUMENT

1. Appellants' principal contention here (J.S. 6–8, 10–11, 15), as it was below, is that because there is

[5] None of the dissenting Commissioners, it should be noted, expressed the view that REA should be restricted to the truckers' terminal areas when it uses some mode of transportation other than its own trucks for the line-haul movement.

[6] Appellants thereafter filed a motion with the lower court to vacate its final judgment, arguing that certain newspaper articles—all of which had been published and were available to appellants before the court decided the case—contained possible "new" facts warranting reconsideration of the Commission's decision; the court denied appellants' motion (J.S. 80a).

some degree of competition between REA and the truckers, and because REA at times operates its own motor vehicles for its line-haul transportation, REA *ipso facto* is a trucker which must be subjected in all instances to the terminal area restrictions applicable to the truckers. The Commission was fully aware "that some motor carriers and freight forwarders may be affected by competition from REA generally" (J.S. 41a). However, the Commission properly declined, as the lower court held, to give controlling weight to this factor, because it found that in spite of the peripheral competition between REA and the truckers, the REA express service was nevertheless sufficiently distinct from the transportation services provided by truckers to warrant different treatment in fixing terminal areas (J.S. 14a). Moreover, the motor carriers encounter no less competition from the railroads and water carriers than they do from REA. Those carriers may operate their own trucks within their terminal areas in performing pickup and delivery services (see 49 U.S.C. 302(c)(1)). Yet, such rail and water carriers' terminal areas do not, and need not, correspond to those of the truckers because of the essential differences in their services. *Pickup and Delivery Limits at Los Angeles, Calif.*, 299 I.C.C. 347, 352–353; *Newtex S.S. Corp., Collection and Delivery Service*, 273 I.C.C. 304, 308–309.

To contend otherwise and assert that REA is simply a trucker (J.S. 6–8, 10–11, 15), an argument essentially made and rejected in *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va.), affirmed,

394 U.S. 718, and *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass.), affirmed, 376 U.S. 514, is to disregard completely (1) REA's distinct service that is unmatched by the truckers (J.S. 10a–11a, 32a–33a, 38a); (2) the important differences between the conditions contained in its motor certificates and those found in the licenses of ordinary truckers, recognizing that REA's motor operations are merely an integral part of its whole express service (J.S. 16a)[7]; and (3) its line-haul operations that are not confined to its trucks, but are diverse and multi-modal in nature (J.S. 38a–39a). In essence, the character of REA's service does not change with the mode of carriage employed for its line-haul transportation, but rather remains throughout the movement of an express carrier. Accordingly, REA is no more an ordinary trucker, as the lower court correctly recognized (J.S. 11a–13a), than it is a railroad when it uses passenger trains. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 427, 431–434.

2. The balance of the appellants' contentions are equally without merit. REA's terminal areas are fully subject to Commission jurisdiction (J.S. 44a–45a). The fact that it defines its terminal areas in its tariffs, as it

[7] See note 1, *supra*.

[8] Even if REA were considered a trucker, the Commission found that its terminal areas could still be treated distinctly from those of other truckers (J.S. 45a). The Commission has already allowed independent terminal area treatment for a particular motor carrier where special circumstances warrant it. See *Commercial Zones and Terminal Areas*, *supra*, 54 M.C.C. 21, 58.

traditionally has done for 60 years,[9] does not, as appellants urge, give it an "unfair advantage" (J.S. 12) over other carriers. Many of them, including the railroads and water carriers, also define their terminal areas in an identical manner, and it is manifestly permissible for them to do so. *Los Angeles Switching Case*, 234 U.S. 294, 313; *Newtex S.S. Corp., Collection and Delivery Service*, 273 I.C.C. 304, 309. Contrary to appellants' suggestion, these carriers, including REA, cannot "expand and alter the geographic scope of their [terminal] operations at will" (J.S. 14), since any proposed tariff change of their terminal areas is subject to investigation and suspension by the Commission and may be attacked by the complaint of any party.[10] *American Trucking Ass'ns, Inc.* v. *United States*, 260 F. Supp. 386, 390 (D.D.C.), affirmed, 387 U.S. 93; *Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558, 564 (D. Del.) Thus, the Commission has not set any new standards here that have, as appellants assert, "freed REA" (J.S. 16) by allowing it to operate for the first time differently from its past practices. Instead, after taking a fresh look at REA's operations, the Commission has allowed it to remain subject to the same terminal area standards that have traditionally applied to express companies for 60 years.

Appellants' contention (J.S. 13–14) that the Com-

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[9] *In re Express Rates, Practices, Accounts, and Revenues*, 24 I.C.C. 380, 394–395.

[10] See *Barton Truck Line, Inc.* v. *REA*, 95 M.C.C. 625, 628–630; *Collection and Delivery Limits [of REA] at Harrisburg, Pa.*, 281 I.C.C. 379.

mission failed to consider the requirements of the National Transportation Policy is negated on the face of the Commission's report and order (J.S. 37a–38a). The lower court correctly found that the Commission properly weighed and satisfied those guidelines (J.S. 15a–16a), particularly by protecting the shipping public (J.S. 15a) which "cares little about the mode of intercity [transportation] employed" by REA, but rather is "concerned only with the express service REA furnishes" (J.S. 13a).

Lastly, the court below properly denied appellants' motion to vacate its final judgment (J.S. 80a). Appellants' alleged "discovery" of "new" facts concerning the possible change in the ownership or control of REA (J.S. 15) is contradicted on the face of the lower court's opinion (J.S. 2a, n. 2).[11] See *Flett* v. *W. A. Alexander & Co.*, 302 F. 2d 321, 323–324 (C.A. 7), certiorari denied, 371 U.S. 841. Moreover, any change in control would not have altered the conclusion reached by the Commission here, as sustained by the court below, since the Commission's determination was not dependent upon who owned REA.[12] Finally, even if a change in control should cause REA's transportation operations at some later time to be materially

[11] *A fortiori*, the "new" evidence would not have been a proper basis for relief. *Illinois Cent. R.R. Co.* v. *Norfolk & W. Ry. Co.*, 385 U.S. 57, 75; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503.

[12] One of appellants' arguments advanced to the court before it decided the case was that the railroads' ownership of REA was critical (J.S. 16). That argument, correctly rejected by the lower court (J.S. 16a), would be unavailing now if the railroads have sold their stock interest in REA.

altered so that it no longer in fact functions as an express company, adequate administrative remedies remain available to appellants to bring such facts to the Commission's attention (see 49 U.S.C. 13). Thus, the lower court correctly exercised its discretion in denying appellants' motion. *Swam* v. *United States,* 327 F. 2d 431, 433 (C.A. 7), certiorari denied, 379 U.S. 852.

## CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

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